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MASIMO AMERICAS, INC.

18 PHYSICIANS HEALTHSOURCE,  
19 INC.,  
20 Plaintiff,  
21 v.  
22 MASIMO CORPORATION, et al.  
23 Defendants.  
24  
25 } Case No. 8:14-cv-00001 JVS (ADSx)  
} Hon. Judge James V. Selna  
} **MASIMO'S OPPOSITION TO  
PLAINTIFF'S MOTION TO  
AMEND DEADLINE TO FILE  
MOTION FOR CLASS  
CERTIFICATION**  
} **HEARING:**  
} Date: April 1, 2019  
} Time: 1:30 p.m.  
} Ctrm: 10C

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1        Defendants Masimo Corporation and Masimo Americas, Inc.  
 2 (collectively, “Masimo”) respectfully submit this Opposition to the Motion of  
 3 Plaintiff Physicians Healthsource, Inc. (“PHI”) to Amend Deadline to File  
 4 Motion for Class Certification from April 8 to June 7, 2019. (Dkt. 169.)

5                    **I. INTRODUCTION**

6        PHI has not demonstrated “good cause” to extend the deadline to file its  
 7 Motion for Class Certification as set forth in Scheduling Order. PHI fails to  
 8 explain why it cannot meet the current deadline. It identifies no specific facts  
 9 that it needs to obtain in discovery before moving for class certification. PHI  
 10 also does not establish its diligence. PHI suggests it needs more time to pursue  
 11 discovery from third parties Odyssey and USAD. But Odyssey has no  
 12 responsive information and USAD has already produced the information it has.

13        PHI accuses Masimo of delaying discovery. That is not true. Masimo  
 14 has been proactively trying to move discovery forward. Further, PHI’s  
 15 proposed schedule would unfairly prejudice Masimo by preventing Masimo  
 16 from having sufficient time to conduct expert discovery or prepare for trial.  
 17 Thus, the Court should deny PHI’s Motion.

18                    **II. STATEMENT OF FACTS**

19        PHI’s accusation that Masimo delayed ignores the record and its own  
 20 failure to proceed diligently. In June 2018, Masimo informed PHI that Masimo  
 21 would: 1) produce its confidential information only after entry of a protective  
 22 order, and 2) limit discovery to the alleged faxes attached to the Complaint as  
 23 Exhibit A. (Dkt. 117, Ex. 3 at 9.) PHI never moved to compel on either issue  
 24 and thus Masimo eventually had to bring both issues to the Court’s attention.

25                    **A. Masimo Diligently Sought A Protective Order And Promptly**  
 26                    **Produced Its Confidential Information**

27        Masimo was reluctant to produce confidential information before the  
 28 Court entered a protective order because PHI’s counsel, Anderson + Wanca

1 (“A+W”), has a documented history of misusing confidential discovery. *See,*  
 2 *e.g., Reliable Money Order, Inc. v. McKnight Sales Co., Inc.*, 704 F.3d 489,  
 3 491–93 (7th Cir. 2013) (despite promising to keep information confidential and  
 4 limit its use for only that case, A+W used the information to solicit new clients  
 5 and file “over one hundred putative class actions under the Act, all rooted in  
 6 data recovered from” the information produced in discovery); *Creative*  
 7 *Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 917 (7th Cir.  
 8 2011) (A+W “demonstrated a lack of integrity”); *Physicians Healthsource, Inc.*  
 9 *v. Allscripts Health Sols., Inc.*, No. 12 C 3233, 2017 WL 4682734, at \*10 (N.D.  
 10 Ill. Oct. 18, 2017) (reviewing decisions that “found the conduct of Anderson +  
 11 Wanca unethical”).

12 From June through September 2018, Masimo conferred with PHI on an  
 13 appropriate protective order. (Dkt. 96 ¶ 2.) When the parties could not agree on  
 14 certain terms, Masimo proposed the parties exchange their respective arguments  
 15 on September 19 and file a joint motion for protective order on September 21.  
 16 (*Id.*, Ex. 8.) PHI did not respond. Thus, Masimo requested a conference of  
 17 counsel within 10 days as provided in the Local Rules. (*Id.*, Exs. 9-11.) When  
 18 PHI refused, Masimo filed a motion for protective order without a joint  
 19 stipulation. (Dkt. 95 at 3-4.) PHI opposed, arguing Masimo should have waited  
 20 for PHI to participate in additional conferences with Masimo. (Dkt. 102 at 7.)

21 After Masimo filed its motion, this Court assigned Magistrate Judge  
 22 Spaeth to the case. (Dkt. 98.) At the hearing, Judge Spaeth asked the parties to  
 23 prepare a new draft protective order according to her model. (Dkt. 117-1, Ex.  
 24 20 at 87:17-88:2.) Masimo prepared a revised version, initiated another  
 25 conference of counsel, and filed a request for informal dispute resolution under  
 26 Judge Spaeth’s Procedures. (*See* Dkt. 114.) Judge Spaeth agreed with Masimo  
 27 on virtually every issue and, on December 21, 2018, entered the Protective  
 28 Order. (Dkt. 123.)

1       On January 8, 2019, Masimo produced its confidential documents relating  
 2 to Exhibit A and, eight days later, supplemented its interrogatory responses to  
 3 include confidential information relating to Exhibit A. (Declaration of  
 4 Benjamin A. Katzenellenbogen (“Katz. Decl.”), Ex. 5 at 2.)

5       **B. Because PHI Never Moved to Compel Discovery Beyond Exhibit A,**  
 6       **Masimo Sought Resolution Of That Issue**

7       Since June, 2018, Masimo objected to PHI’s requests for discovery about  
 8 faxes beyond Exhibit A. (Dkt. 96, Ex. 3.) Masimo made that objection in good  
 9 faith based on case law this Court later characterized as “directly on point.”  
 10 (*See* Dkt. 168 at 6 (citing *St. Louis Heart Ctr., Inc. v. Nomax, Inc.*, 4:15cv517  
 11 RLW, 2015 WL 9451046, at \*2 (E.D. Mo. Dec. 23, 2015))).) PHI never moved  
 12 to compel. Thus, Masimo eventually had to raise the issue with the Court.

13       Masimo initially asked the Court to address the scope of discovery in the  
 14 motion for protective order discussed above. (Dkt. 95 at 11.) At the hearing,  
 15 Judge Spaeth instructed the parties to refile the motion based on specific  
 16 discovery requests. (Dkt. 117, Ex. 20 at 88-89.) Thus, Masimo filed a new  
 17 motion for protective order based on PHI’s discovery requests seeking  
 18 information beyond Exhibit A and to quash discovery served on third parties  
 19 seeking the same information. (Dkt. 116.) On January 4, 2019, the Magistrate  
 20 denied both aspects of Masimo’s motion. (Dkt. 126.) Masimo sought review  
 21 under Rule 72(a).<sup>1</sup> (Dkt. 139.)

22       On February 27, 2019, this Court reviewed the Judge Spaeth’s Order and  
 23 granted Masimo’s request to set aside the portion of the Order that applied to  
 24 Masimo because it was “contrary to law.” (*See* Dkt. 168 at 6.) However, the

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<sup>1</sup> PHI argues Masimo should have moved to stay Judge Spaeth’s Order.  
 26 (Dkt. 169 at 6.) A motion to stay was unnecessary because the order granted  
 27 PHI no affirmative relief. (*See* Dkt. 126.) PHI complains that Masimo did not  
 28 inform third parties that it had not moved to stay the Order, but PHI was free to  
 communicate that point if PHI thought it was relevant.

1 Court affirmed with respect to the third-party discovery. (*Id.* at 10.) Based on  
 2 the Court’s analysis, Masimo promptly produced documents beyond those  
 3 relating to Exhibit A on March 5, even though PHI never obtained an order  
 4 compelling Masimo to produce anything. (Katz. Decl., Ex. 5 at 2.)

5 **C. Masimo Did Not Refuse To Provide Witnesses For Depositions**

6 In July, PHI asked to depose Masimo employee Shanta Fisher in August  
 7 2018. (Katz. Decl., Ex. 1.) Because PHI refused to agree to a protective order,  
 8 however, Masimo had not yet produced confidential information. (*Id.*) Masimo  
 9 explained that PHI could depose Fisher, but only once, and suggested PHI wait  
 10 until after Masimo produced its confidential information. (*Id.*)

11 PHI withdrew its deposition notice and did nothing until January, when it  
 12 falsely accused Masimo of attempting to prevent Fisher’s deposition. (*Id.*, Ex.  
 13 2.) Masimo maintained that PHI was free to depose Fisher anytime, but only  
 14 once. (*Id.*, Ex. 3.) PHI unilaterally noticed the depositions of Fisher and three  
 15 former Masimo employees for late February. (Dkt. 169-1, Ex. D.) Masimo has  
 16 since provided dates for all witnesses. (Katz. Decl., Ex. 5.)

17 **III. PHI IS NOT ENTITLED TO AN EXTENSION**

18 A scheduling order may be modified “only for good cause and with the  
 19 judge’s consent.” Fed. R. Civ. P. 16(b)(4). “Rule 16(b)’s ‘good cause’ standard  
 20 primarily considers the diligence of the party seeking the amendment.” *Johnson*  
 21 *v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). The  
 22 scheduling order may be modified only if deadlines “cannot reasonably be met  
 23 despite the diligence of the party seeking the extension.” *Id.* “Although the  
 24 existence or degree of prejudice to the party opposing the modification might  
 25 supply additional reasons to deny a motion, the focus of the inquiry is upon the  
 26 moving party’s reasons for seeking modification.” *Id.* “If that party was not  
 27 diligent, the inquiry should end.” *Id.*

28 / / /

1       Here, PHI fails to establish “good cause” to modify the scheduling order  
 2 for three reasons. First, PHI fails to explain why it cannot meet the current  
 3 deadline to seek class certification. Second, PHI does not establish that it acted  
 4 diligently. Third, PHI’s requested extension would prejudice Masimo.

5       **A. PHI Failed To Establish It Cannot Reasonably Meet The Deadline**

6       PHI failed to establish it cannot meet the current deadline. Nor could PHI  
 7 make such a showing, particularly because the Court recently extended the  
 8 class-certification deadline by two months. (*See* Dkt. 141.)

9       PHI asserts it needs three categories of information, “the USAD subpoena  
 10 response, the ‘fax leads’ from Masimo, and depositions of [four Masimo  
 11 witnesses] prior to filing its Motion for Class Certification.” (Dkt. 169 at 8:19-  
 12 22.) PHI does not explain why it needs this information. That failure prevents  
 13 the Court from evaluating whether the information is necessary and whether  
 14 PHI diligently sought it. PHI’s “general desire to continue engaging in  
 15 discovery does not provide good cause.” *See Nguyen v. Biter*, No. 1:11-cv-  
 16 00809-AWL-SKO (PC), 2015 WL 366935, at \*6 (E.D. Cal. Jan. 27, 2015);  
 17 Wright & Miller: Federal Practice and Procedure § 1522.2 (“A party’s assertion  
 18 that further discovery is needed, without more, will not suffice”); *Benge v.*  
 19 *Ryan*, 154 F. Supp. 3d 857, 862 n.2 (D. Ariz. 2016).

20       Moreover, PHI will have all the information it claims to need. First,  
 21 USAD already produced documents responsive to the subpoena. (Katz. Decl.,  
 22 Ex. 4.) Second, Masimo offered dates for depositions of all four witnesses.  
 23 (*Id.*, Ex. 5.) Third, Masimo searched for the “fax leads” that PHI first identified  
 24 on February 13, and produced everything it found. (*Id.*) Accordingly, the Court  
 25 should deny PHI’s Motion because PHI failed to explain why it cannot meet the  
 26 present deadline.

27       ///

28       ///

1        **B. PHI Has Not Established Diligence**

2            The Court should also deny PHI's Motion because PHI has not been  
 3 diligent. PHI argues it was diligent in pursuing discovery from Masimo and  
 4 third parties Odyssey and USAD. (Dkt. 169 at 2:25-4:10.) That is not true.

5        **1. PHI Did Not Diligently Pursue Discovery From Masimo**

6            **a. PHI Obstructed Entry Of A Protective Order**

7            PHI falsely asserts that "Masimo has sought to impede Plaintiff's ability  
 8 to obtain discovery necessary to support its Motion for Class Certification." (*Id.*  
 9 at 4:14-16.) To the contrary, PHI prevented Masimo from producing  
 10 confidential information by refusing a reasonable protective order.

11           In June 2018, Masimo objected to PHI's discovery requests on the basis  
 12 of confidentiality and stated it would not produce confidential information until  
 13 the Court entered a protective order. (*See* Dkt. 117, Ex. 3 at 9.) Masimo could  
 14 not rely on a mere promise by PHI's counsel to keep information confidential  
 15 because A+W had previously disregarded such promises. (*See* Section II.A.,  
 16 *supra*.)

17           Despite Masimo's offer to produce confidential discovery as soon as the  
 18 Court entered a Protective Order, PHI did not seek a protective order or move to  
 19 compel to overcome Masimo's confidentiality objections. Instead, PHI actively  
 20 delayed entry of a protective order. (*See* Section II.A., *supra*.) It took Masimo  
 21 nearly six months to obtain one. (*Id.*) If PHI had agreed to the reasonable  
 22 protections Masimo sought, or even cooperated with Masimo in raising the  
 23 issues with the Court, Masimo could have started producing confidential  
 24 information months earlier. Masimo acted diligently, and PHI's refusal to  
 25 participate in obtaining a joint protective order is the antithesis of diligence.

26           PHI also implies that, by asking the Court to rule on the scope of  
 27 discovery, Masimo delayed production of confidential documents from Masimo  
 28 and SK&A. (*See* Dkt. 169 at 5:23-6:1, 8:6-11.) That is not true. Masimo and

1 SK&A produced confidential information because the Protective Order had  
2 finally been entered. Indeed, at the January 2 hearing, Masimo explained that it  
3 had produced non-confidential documents and was preparing to produce  
4 confidential documents because the Court recently entered the Protective Order.  
5 (Dkt. 140, Ex. 1 at 11:20-25.) On January 8, Masimo produced those  
6 documents and supplemented its interrogatory responses with confidential  
7 information days later. (Dkt. 169-1 ¶ 6.) On January 19, SK&A produced its  
8 confidential information. (*Id.* ¶ 7.)

9 **b. PHI's "Masimo's Premise" Argument Is Baseless**

10 PHI's primary argument appears to be its assertions regarding "Masimo's  
11 Premise," which PHI defines as "fax advertisements exist separate and apart  
12 from the two faxes Plaintiff alleges Masimo sent to it." (See Dkt. 169 at 3:3-9,  
13 4:22-5:22, 7:2-21; 9:4-7.) PHI asserts it was prejudiced because PHI now  
14 believes "Masimo's Premise" is not true. This argument makes no sense for a  
15 number of reasons.

16 First, "Masimo's Premise" was always true. Masimo objected and  
17 repeatedly told PHI it was limiting discovery to information concerning Exhibit  
18 A. (Dkt. 96, Ex. 3.) Consistent with its objection, Masimo produced discovery  
19 regarding entities who may have received Exhibit A, but did not originally  
20 produce discovery concerning information beyond Exhibit A. (See *id.*). Again,  
21 PHI never moved to compel to overcome Masimo's objections.

22 Second, after PHI first raised this argument, Masimo unequivocally  
23 represented that "Masimo has confirmed the understanding it expressed at the  
24 hearing that . . . Masimo has additional potentially responsive documents."  
25 (Dkt. 165.) PHI never explains its alleged belief that no such documents exist  
26 after Masimo made that statement. (See Dkt. 169 at 7:11-21.)

27 Third, Masimo has now produced discovery beyond Exhibit A, which  
28 again confirms that "Masimo's Premise" is true. PHI argues that Masimo

1 delayed and PHI suffered prejudice since June 2018 “[i]f it ultimately turns out  
2 Masimo’s Premise is false.” (*Id.* at 3:7-9; 9:4-6.) Because “Masimo’s Premise”  
3 was indisputably true, PHI suffered no prejudice and Masimo did not delay this  
4 case. Indeed, PHI concedes that, “but for” the alleged falsity of “Masimo’s  
5 Premise,” PHI would not have grounds to amend the scheduling order. (*Id.* at  
6 8:21-24). Because “Masimo’s Premise” is indisputably true, PHI effectively  
7 concedes it has no basis for seeking to amend the schedule. This should resolve  
8 PHI’s Motion.

c. **PHI Did Not Diligently Seek Discovery Beyond Exhibit A**

10 The timing of Masimo’s production of documents beyond Exhibit A  
11 cannot provide “good cause” because PHI did not diligently pursue discovery  
12 beyond Exhibit A. PHI concedes that Masimo consistently and unequivocally  
13 objected that “Plaintiff’s discovery needed to be limited to the two faxes  
14 Plaintiff alleges Masimo sent to it.” (*Id.* at 3:1-7.) Masimo made its objection  
15 in good faith based on case law limiting discovery to faxes the plaintiff claimed  
16 to have received. (*See* Dkt. 168 at 6.) Although this Court ultimately disagreed  
17 on the scope of discovery, there was nothing improper or unreasonable about  
18 Masimo’s objection.

19        In the **nine months** that followed Masimo’s objection, PHI never moved  
20 to compel. The only reason the scope of discovery ever came before the Court  
21 was because **Masimo** raised the issue. (See Dkt. 95 at 11; Dkt. 116 at 1; Dkt.  
22 139 at 1.) Masimo could have stood on its good-faith objections and waited for  
23 PHI to move to compel. Instead, Masimo proactively brought the issue to the  
24 Court’s attention. PHI cannot credibly claim to have been diligent when it did  
25 nothing to obtain this information and was content to litigate this case without it.

26 PHI's failure to move to compel shows PHI thought this information was  
27 not important to class certification. If the information was important to PHI,  
28 then PHI's nine-month failure to move to compel shows PHI was not diligent.

1 Regardless, Masimo has produced its non-Exhibit A information. (See Katz.  
2 Decl., Ex. 5.)

3 **d. Masimo Did Not “Cancel” Scheduled Depositions**

4 PHI’s claim that Masimo “unilaterally cancelled” four depositions  
5 “without explanation” is not true. (See Dkt. 169 at 6:11-13.) As addressed  
6 above, Masimo consistently told PHI it would allow PHI to depose Masimo  
7 witnesses only once, and would not allow depositions both before and after  
8 receiving documents from Masimo. (See Section II.C, *supra*.) PHI also noticed  
9 dates without coordinating with Masimo or even asking if the witnesses were  
10 Masimo employees. (*Id.*) Moreover, because three of the witnesses PHI seeks  
11 to depose are not Masimo’s employees, PHI’s deposition notices were  
12 ineffective as to those witnesses and there were no depositions to “cancel.”

13 **2. PHI Does Not Need Time To Pursue Discovery From Odyssey**

14 PHI argues it diligently pursued discovery from Odyssey. (Dkt. 169 at 3-  
15 4.) As a preliminary matter, PHI represents to the Court that Odyssey is “the  
16 sub-contractor engaged by Masimo for the purpose of sending the faxes at issue  
17 in this matter . . .” (*Id.* at 3.) PHI tellingly provides no support for this  
18 assertion. Regardless, PHI did not diligently seek discovery from Odyssey.  
19 PHI served a subpoena on Odyssey on October 2, 2018, and never moved to  
20 enforce it. (*Id.* at 3:10-12.)

21 PHI also does not claim it needs more time to take discovery from  
22 Odyssey. Nor could it. PHI asserts that, before PHI served its subpoena,  
23 Odyssey was the victim of a cyber-attack and has no potentially responsive  
24 information. (See *id.* at 3:18-24.) Thus, no amount of additional time would  
25 provide PHI with more information from Odyssey.

26 PHI appears to accuse Masimo of being responsible for Odyssey’s lack of  
27 documents. (See *id.* at 3:10-4:5.) As support, PHI refers to a declaration it  
28 obtained from Odyssey’s CEO, Mr. Lokaisingh. (Dkt. 169-2 at 2.) PHI asserts

1 that Lokaisingh “explained that ‘[p]rior to September 21, 2018, Odyssey’s  
2 custom and practice was to retain all transmission logs, fax images, and billing  
3 records’ and ‘Odyssey would have been able to provide responsive documents  
4 to Plaintiff’s subpoena.’” (Dkt. 169 at 3:21-24.) PHI then asserts that “[a]t no  
5 time did Odyssey receive a preservation letter from Masimo.” (*Id.* at 4:4-5.)

6 PHI cites no authority holding that Masimo had an obligation to send  
7 Odyssey a preservation letter and no evidence that Masimo had control over  
8 Odyssey. A party has no obligation to preserve documents from third parties  
9 over which it has no control. *See Ayers v. Sheetz, Inc.*, No. 3:11-CV-00434,  
10 2012 WL 5331555, at \*1 (S.D.W. Va. Oct. 26, 2012); *see also First Fin. Sec.,*  
11 *Inc. v. Freedom Equity Grp., LLC*, No. 15-cv-1893, HRL, 2016 WL 5870218, at  
12 \*4 (N.D. Cal. Oct. 7, 2016) (declining to impose sanctions where a party’s  
13 phone company destroyed records in the ordinary course of business).

14 Further, PHI’s arguments are misleading. Lokaisingh joined Odyssey in  
15 2017 and has no knowledge of what documents Odyssey may have retained or  
16 discarded before PHI filed this lawsuit in 2014. (Supp. Lokaisingh Decl., ¶ 1.)  
17 However, since at least 2017 when he joined Odyssey, Odyssey’s practice has  
18 been to retain for only one year the type of documents PHI sought in its  
19 subpoena. (*Id.* ¶ 4.) Lokaisingh “did not intend [his prior] statement to suggest  
20 that, prior to September 21, 2018, Odyssey had, or was likely to have had,  
21 documents responsive to Plaintiff’s subpoena.” (*Id.* ¶ 7.) Rather, he “meant  
22 that, prior to September 21, 2018, Odyssey would have been able to search its  
23 records[,]” whereas after September 22, 2018, “Odyssey no longer had any  
24 records to search.” (*Id.* ¶ 6.)

25 PHI knows that its arguments are misleading. In discussing the first  
26 declaration with PHI’s counsel, Lokaisingh “made it clear to him that it is  
27 unlikely Odyssey would have had any documents responsive to Plaintiff’s  
28 subpoena as of September 21, 2018, because of the document retention policies

1 Odyssey had in place since I joined the company in 2017.” (*Id.* ¶ 9.) Thus, PHI  
2 had no good-faith basis to even imply that Odyssey would have had responsive  
3 documents but-for the cyber-attack in 2018.

4 **3. PHI Did Not Diligently Pursue Discovery From USAD**

5 PHI also argues it diligently sought discovery from a telecommunications  
6 company called USAD. (*See* Dkt. 169 at 4:6-10.) But PHI just served its  
7 USAD subpoena on March 1, 2019. (*Id.* at 4:6-7.) PHI does not explain why it  
8 waited until March to serve this subpoena. (*See id.*) PHI implies it learned of  
9 USAD from Lokaisingh. (*See id.* at 4:1-4.) If that were true, then PHI could  
10 not have been diligent. PHI could have learned about USAD months earlier by  
11 calling Lokaisingh—which is apparently how PHI learned of USAD in  
12 February. If USAD’s identity were relevant to class certification, PHI’s  
13 decision to wait until the end of February to ask Lokaisingh for that information  
14 would not be diligent.

15 Regardless, USAD already produced its responsive documents. (*See*  
16 Katz. Decl, Ex. 4.) PHI does not identify any further information it needs from  
17 USAD to seek class certification. Thus, in addition to not being diligent, PHI  
18 has not established it needs more time to take discovery from USAD.

19 **C. PHI’s Proposed Schedule Is Unworkable And Prejudices Masimo**

20 PHI requests to continue the deadline to seek class certification without  
21 changing other dates. That request would compress the schedule and unfairly  
22 prejudice Masimo. This is an additional reason why PHI has not established  
23 “good cause.” *See Johnson*, 975 F.2d at 609.

24 The initial schedule provided five months to complete expert discovery  
25 after the deadline to seek class certification. (*See* Dkt. 65.) At PHI’s request,  
26 Masimo recently agreed to extend the deadline for PHI to seek class  
27 certification by two months. (Dkt. 141.) As a result, the current schedule is  
28 already very compressed. Fact and expert discovery are scheduled to close in

1 early July, only three months after PHI’s deadline for seeking class certification.  
2 (See Dkt. 65, 141.) That already limits the parties’ ability to conduct merits  
3 discovery after the Court rules on class certification. Based on PHI’s April 8  
4 deadline, the hearing on class certification will be May 27 or later. (See Dkt.  
5 141.) However, under the current schedule, the parties are at least likely to  
6 know whether this case will proceed as an individual or class action before  
7 expert discovery closes on July 1.

8 Under PHI’s new proposal, PHI would not file its motion for class  
9 certification until June 7. The hearing could be no earlier than July 29, nearly  
10 one month *after* expert discovery closes. Moreover, the hearing would be only  
11 two weeks before the last day to file motions, and two months before pretrial  
12 filings begin on September 23. That leaves little time for this Court to rule on  
13 class certification and gives the parties insufficient time to assess the impact of  
14 the Court’s ruling before trial.

15 **D. The Rule 15 Factors Also Weigh Against Amendment**

16 PHI acknowledges that “undue delay,” “bad faith,” and “prejudice to the  
17 opposing party” all weigh against allowing amendment even under the more  
18 liberal standards of Rule 15(a). (Dkt. 169 at 7:23-26.)

19 As discussed, PHI unduly delayed. PHI delayed entry of the Protective  
20 Order, which delayed Masimo and SK&A from producing confidential  
21 information. PHI also never sought to compel production of the confidential  
22 information, or compel discovery beyond Exhibit A.

23 PHI’s arguments regarding “Masimo’s Premise” are not made in good  
24 faith as PHI has always known that Masimo had documents beyond Exhibit A.  
25 PHI’s characterizations of Odyssey’s document retention policies and the  
26 current CEO’s knowledge are also made in bad faith in view of what the current  
27 CEO told PHI’s counsel.

28 / / /

Finally, as discussed above, PHI's proposed schedule would unfairly prejudice Masimo because it would not allow Masimo sufficient time to conduct merits and expert discovery, or prepare for trial.

#### IV. CONCLUSION

For all the reasons discussed above, Masimo respectfully requests the Court deny Plaintiff's Motion.

Respectfully submitted,

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